PRIVY COUNCIL REPORT

HILBORNE v. LAW SOCIETY OF SINGAPORE

[P.C. (Lord Diplock, Lord Fraser of Tullybelton and Lord Russell of Killowen) January 30 & 31 and March 7, 1978]

[Privy Council Appeal No. 22 of 1976]

Legal Profession — Advocate and Solicitor — Disciplinary proceedings — Improper conduct — Comment at the close of the case that by refusing to reopen proceedings the court was "setting a seal on dishonesty" — Penalty of $250 imposed by Law Society — Legal Profession Act (Cap. 217), ss. 84(2), 88(1)(b), 89(1) and 93.

The appellant is an advocate and solicitor in Singapore. The Council of the Law Society of Singapore decided that the appellant was guilty of improper conduct as such and ordered that he should incur a penalty of $250. The improper conduct of the appellant was in connection with certain proceedings before the Court of Appeal. The appellant wanted to reopen the proceedings. The Court of Appeal refused the application. The appellant then made the comment that by refusing to reopen the appeal the Court of Appeal "set the seal upon dishonesty". Counsel appearing for the other side in those proceedings (Mr. C) challenged the appellant to repeat his words outside the court. The appellant then wrote to Mr. C. a letter including the phrase "I stated to the two judges present that in my opinion in refusing to reopen the appeal they were setting a seal on dishonesty". The appellant appealed to Chua J. to set aside the order of the Law Society. Chua J. refused the application and affirmed the penalty. On appeal to the Court of Appeal, the appeal was dismissed ([1973] 1 M.L.J. 189). The appellant then appealed to the Privy Council.

Held: (1) the question to consider was whether the remark was made to the court after the court had finally and in terms refused to reopen the appeal or whether it was made in the nature of a submission in the course of seeking to persuade the court to reopen the appeal. The Court of Appeal concluded that the remark was made after the judges had refused to reopen the appeal and the Board concurred in that finding;

(2) the remark made by the appellant was offensively critical of the judges, was intended to be so, and by any ordinary standards of the profession constituted improper conduct by the appellant;

(3) the ability of the Council of the Law Society to act under sections 88(1)(b) and 89(1) of the Legal Profession Act was not restricted to one or more of the paragraphs under section 84(2) of the said Act. It could still be a subject matter of disciplinary action by the Council by the imposition of a penalty.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Stuart McKinnon for the appellant.

Robin Auld Q.C. and *Ian Glick* for the respondent.

Lord Russell of Killowen (delivering the judgment of the Board): The appellant is an advocate and solicitor in Singapore. The Council of the Law Society there decided that he had been guilty of improper conduct as such and ordered that he should incur a penalty of $250. The appellant contended that in law there was no justification for this action. He proceeded to challenge it in the High Court by the appropriate procedure of an originating summons applying to set aside the order of the Council. Chua J. refused the application and affirmed the penalty, but gave leave to appeal to the Court of Appeal. On appeal that court (the Chief Justice, Winslow J. and Kulasekaram J.) dismissed the appeal. The appellant now appeals by special leave of this Board.

The alleged improper conduct of the appellant was in connection with proceedings in which the plaintiffs, represented by the appellant, sought recovery of about $2,500, the cost of furniture made by them for use at a proposed night club and restaurant, the Golden Pagoda Garden Nite-Club and Restaurant, and duly delivered at its premises. The order was placed by the first defendant in that action, Tan Eng Huat, purporting to act on behalf of the second defendants, Golden Palace Private Ltd. Their Lordships do not think it necessary to rehearse in detail the progress of that litigation. The second defendants denied liability and before delivering a defence requested particulars of the claim, which curiously enough did not in express terms assert that the order had been placed by the first defendant on behalf of the second, but only claimed against the latter "if" the order had been so placed. There was a dispute whether particulars could be called for before delivery of defence: the second defendants intimated that they were applying for an order for particulars and for extension of time for delivery of defence: the appellant for the plaintiffs nevertheless sought and obtained judgment against the second defendants in default of defence very shortly before the return date for the second defendants' application, which was adjourned *sine die* to afford to the latter an opportunity to apply to set aside the default judgment.

That application was heard by the Chief Justice on affidavit evidence. Again the details are not for present purposes important. Suffice it to say that for the second defendants it was being put forward that those defendants had no interest in the night club at the relevant time: on the contrary the premises were let to a partnership of which the first defendant was a member. The default judgment was set aside and particulars ordered. The plaintiffs appealed and on January 21, 1971 the Court of Appeal dismissed the appeal.

After that dismissal but before the order of the Court of Appeal was perfected the appellant received information, mainly from an advocate and solicitor, Mr. Ong Swee Keng, which suggested to him that a false and dishonest case had been put forward by and on behalf of the second defendants in that according to Mr. Ong, a director of the second defendants, the business of the night club was at the relevant time owned and run by the latter and that the first defendant as a director (and approved in principle as managing director) had authority of the second defendants to place the order for the furniture. Again the details do not matter: suffice it to say that it is clear that the appellant considered that a false case had been presented for the second defendants, supported by affidavit evidence from an employee of Mr. Chung, the solicitor of the second defendants. (Their Lordships remark that ultimately in the winding up of the second defendants the Official Receiver appears to have recognised the plaintiffs' claim.)

Armed with a statutory declaration from Mr. Ong the appellant applied to the Court of Appeal to reopen the appeal, with a view to reinstating the default judgment, on the ground that the evidence now showed a dishonest case put forward for the second defendants. (This was the occasion for the comment by the appel-

lant, as advocate for the plaintiffs, which has been concurrently held by the Council of the Law Society, by Chua J., and by the Court of Appeal on appeal from Chua J. to constitute improper conduct.) The Court of Appeal refused the application to reopen the appeal.

The comment made by the appellant was that by refusing to reopen the appeal the Court of Appeal "set the seal upon dishonesty". Mr. Chung having challenged the appellant to repeat his words outside court, taking the phrase as a reflection upon his firm, the appellant wrote to him on the same day a letter including the phrase

"I stated to the two judges present that in my opinion in refusing to reopen this appeal, they were setting a seal on dishonesty."

In considering the question of improper conduct the first question of fact is whether this remark was made to the court after the court had finally and in terms refused to reopen the appeal, the appellant being incensed at the outcome, or whether it was in the nature of a submission in the course of seeking to persuade the court to reopen the appeal, on lines such as "If the court declines to reopen this appeal I submit that the effect will be to set a seal upon dishonesty". In their Lordships' view it was clearly the former. They have already quoted from the appellant's letter to Mr. Chung of March 13, 1971. Mr. Chung having forwarded that letter to the secretaries to the two relevant judges the Registrar of the Court on their instructions wrote to the Law Society thus:

"Their Lordships are of the view that the conduct of Mr. Hilborne in expressing the opinion after the decision not to reopen the appeal had been pronounced, that 'in refusing to reopen this appeal they (*i.e.* their Lordships) were setting a seal on dishonesty' merits investigation."

In his letter dated May 24, 1971 to the Inquiry Committee of the Law Society the appellant said:

"In the event, their Lordships did not deem fit to re-open the hearing of the appeal. It seemed, and still seems, to me that for a litigant to misinform the court in circumstances such as these was dishonesty in the legal, if not the actual sense, and for a court, having been apprised of the nature of the falsity, to fail to express any disapproval of the same, let alone investigate the matter further, was tantamount to condonation of that dishonesty. It was these circumstances that led to the observation which I made."

It is true that in his affidavit in support of his application to set aside the penalty on May 25, 1972 the appellant used the phrase

"it was during the course of this hearing" [*i.e.* of the appeal] "that I uttered the words..."

a phrase echoed by his counsel during the hearing before Chua J.: though it is to be noted that counsel also said that the appellant "was *disappointed* and he made this remark" and further said that he "was expressing view that the *decision* the two judges made was in effect giving effect to the dishonesty of the second defendant". At the same hearing before Chua J. the appellant (though represented) interjected a statement to suggest that it was before the decision was pronounced and that the remark was conditional in form. A copy of the letter from the Court Registrar already quoted was sent on April 12, 1971 by the Law Society to the appellant: their Lordships have already quoted from the relevant answer of the appellant which does nothing to deny the clear statement of the judges that the remark was made after the decision had been pronounced. The Court of Appeal in the judgments under appeal concluded that the remark was made after the judges had refused to reopen the appeal and their Lordships concur in that finding.

Before considering the legal arguments advanced for the appellant their Lordships would observe that in their opinion the remark at that juncture was offensively critical of the judges, was intended to be so, and by any ordinary standards of the profession constituted improper conduct by the appellant. It was argued that the judges themselves at the time did not appear so to regard it, for they made neither comment nor rebuke. But Mr. Chung was apparently voicing indignation at what he regarded (rightly no doubt) as additionally an accusation against his firm and his client, and it may well be that the judges at the time thought that intervention would only serve to heat the atmosphere. Indeed if the appellant had not accepted Mr. Chung's challenge in court by writing on returning to his office the letter already cited, and had that letter not been forwarded to the judges, maybe no more would have been heard of the matter. But the judges, faced with that letter as a written record, shortly thereafter, plainly felt that the episode could not then be passed over.

Their Lordships will first set out the relevant extracts from the legislation (Legal Profession Act: 1970 edition Cap. 217) relating to discipline over the conduct of the legal profession in Singapore.

Section 83(3) is as follows:—

"The Supreme Court or any judge thereof may exercise the same jurisdiction in respect of advocates and solicitors as can be exercised by a superior court in England over barristers or solicitors practicising before any such court."

Section 84(1) is as follows:—

"All advocates and solicitors shall be subject to the control of the Supreme Court and shall be liable on due cause shown to be struck off the roll or suspended from practice for any period not exceeding two years or censured."

Section 84(2) is as follows:—

"Such due cause may be shown by proof that such person — ...

(*b*) has been guilty of fraudulent or grossly improper conduct in the discharge of his professional duty or guilty of such a breach of any usage or rule of conduct made by the council under the provisions of this Act as in the opinion of the court amounts to improper conduct or practice as an advocate and solicitor; or

(*h*) has done some other act which would render him liable to be disbarred or struck off the roll of the court or suspended from practice or censured if a barrister or solicitor in England due regard being had to the fact that the two professions are fused in Singapore; or ..."

These matters — striking off, suspension or censure — are matters to be dealt with ultimately by a special court of three (section 98).

Their Lordships set out these extracts from section 84 primarily because it was not contended by the respondent that the case fitted into those or any other paragraph of section 84(2), and it was contended by the appellant that section 84(2) was an exhaustive statement of matters which could be the subject of disciplinary proceedings under the statute.

The procedure for dealing with complaints of professional misconduct under the statute may be thus summarized. The Law Society has a standing Inquiry Committee. Section 86(1) and 86(2) are as follows:—

"86. (1) Any application by any person that an advocate and solicitor be dealt with under this Part and any complaint of the conduct of an advocate and solicitor in his professional capacity shall in the first place be made to the Society and the Council shall refer the application or complaint to the Inquiry Committee.

(2) The Supreme Court or any judge thereof or the Attorney-General may at any time refer to the Society any information touching upon the conduct of a solicitor in his professional capacity and the Council shall issue a written order to the Inquiry Committee."

By section 87(1) it is provided that

"Where the Inquiry Committee has —

(*a*) received a written order

...

it shall inquire into and investigate the matter and report to the Council on the matter."

In the present case the Registrar's letter operated under section 86(2).

Section 88(1) reads as follows:—

"(1) The Council shall consider the report of the Inquiry Committee and according to the circumstances of the case shall determine —

(*a*) that a formal investigation is not necessary; or

(*b*) that no cause of sufficient gravity exists for a formal investigation but that the advocate and solicitor should be ordered to pay a penalty under section 89 of this Act; or

(*c*) that there should be a formal investigation by a Disciplinary Committee; or

(*d*) that the matter be referred back to the Inquiry Committee, or adjourned for consideration."

Section 89 reads as follows:—

"(1) If the Council determines under section 88 of this Act that no cause of sufficient gravity exists for a formal investigation but that the advocate and solicitor should be ordered to pay a penalty it may order the advocate and solicitor to pay a penalty of not more than two hundred and fifty dollars.

(2) The provisions of section 95 of this Act apply to any penalty ordered to be paid under subsection (1) of this section.

(3) Before the Council makes an order for the payment of a penalty under this section it shall notify the advocate and solicitor concerned of its intention to do so and give him a reasonable opportunity to be heard by the Council."

In the instant case the Council after considering the report of the Inquiry Committee determined in accordance with section 88(1)(b) and ordered a penalty of $250 under section 89(1).

Section 95 provides that in the case of a penalty ordered by the Council the advocate may apply by originating summons to a judge to set aside the order. Any penalty not set aside may be recoverable by the Law Society as a judgment debt.

In any case in which the Council considers that there should be a formal investigation a Disciplinary Committee is set up by the Chief Justice to hear and investigate the matter. The provisions dealing with the Disciplinary Committee have only an indirect relevance to the instant case but touch importantly upon the appellant's submission that no conduct can be the subject of any disciplinary action unless it can be brought within a paragraph of section 84. Their Lordships are unable to accept that the ability of the Council to act under sections 88(1)(b) and 89(1) is so restricted. It was argued that the reference in section 88(1)(b) to "cause" echoes and is limited to that which is "due cause" in section 84(1) and (2). Their Lordships would not in any event accept that this was necessarily so: but the matter appears to them to be concluded by the contrast that is to be found in section 93: that provides, in a Disciplinary Committee case, as follows:—

"93(1) After hearing and investigating any matter referred to it a Disciplinary Committee shall record its findings in relation to the facts of the case and according to those facts shall determine —

(*a*) that no cause of sufficient gravity for disciplinary action exists under section 84 of this Act; or

(*b*) that while no cause of sufficient gravity for disciplinary action exists under that section the advocate and solicitor should be reprimanded; or

(*c*) that cause of sufficient gravity for disciplinary action exists under that section."

Thus there is the express link with and limitation to the content of section 84 in cases of formal investigation by a Disciplinary Committee which is markedly lacking in section 88(1)(b). It was urged for the appellant that unless the latter was confined to section 84(2) matters it would be at large for the Council to hold anything to be impropriety of conduct meriting a penalty. But the Council is a responsible body of professional men, and an aggrieved advocate has recourse to the court.

To some extent their Lordships have already indicated the course of events which fit into the statutory framework. The court by the Registrar's letter of March 19, 1971 referred the matter to the Law Society and it was in turn referred to the Inquiry Committee: the latter on April 12 asked the appellant for his explanation in writing and whether he wished to be heard by the Committee. The appellant on May 24, 1971 wrote a long letter in answer from which their Lordships have already quoted, attaching the documents upon which he based his conclusion that the second defendants had put forward a dishonest case. Later the Inquiry Committee reported to the Council of the Law Society.

On July 27, 1971 the Law Society wrote to the appellant as follows:—

"I refer to your letter dated the 24th May, 1971 and am directed to inform you that the Council after considering the Report of the Inquiry Committee on the complaint made against you by the Registrar of the Supreme Court, had determined that under section 91(1)(b) of the Legal Profession Act, 1966, no cause of sufficient gravity exists for a formal investigation, but that as your conduct towards their Lordships was improper it is the Council's present intention that you should be ordered to pay a penalty under section 92 of the Act; the amount of the penalty in this case has been fixed at $200- (*sic* in Record copy).

2. Before making a formal order to this effect, I am directed to notify you of the Council's intention to do so pursuant to the provisions of section 92(3) of the Act, and to enquire whether you wish to be heard by the Council before such an order is made."

[The sections referred to are the former numbering of sections 88(1)(b) and 89.]

On July 29, 1971 the appellant replied as follows:

"I have received your letter of the 27th instant, and I note what you say. I take it that your letter means that there was a finding by the Inquiry Committee that my conduct was improper, and I should be glad if you would kindly confirm this. Furthermore, I desire to be informed whether or not I am entitled to know the grounds on which that finding was based since I wish to be quite clear about this. On receipt of your reply, I will write you further with regard to the second paragraph of your letter."

On August 20, 1971 the Council replied as follows:

"I am directed to reply to your letter dated the 29th July, 1971, and to say that it is the Council which has to consider the propriety or otherwise of your conduct. It has done so after considering the recommendations of the Inquiry Committee, and is of the opinion that your statement that in refusing to reopen the appeal the judges were setting a seal on dishonesty is, on your own construction of the words as set out in your letter of the 24th May, 1971, to the Inquiry Committee, improper conduct.

2. I am directed to enquire whether you wish to be heard by the Council before any Order is made by it under section 92(3) of the Legal Profession Act, 1966."

Subsequently the appellant appeared before the Council and was heard, and the Law Society wrote to him on May 5, 1972 as follows:—

"I am directed to refer to the Council meeting held last week at which you were present and that notice was given to you of the Council's intention to make an Order for the payment of a penalty and at which your representations were heard.

2. The Council after further due consideration has ordered that you pay $250/- under section 89 of the Legal Profession Act (Cap. 217)."

On May 26, 1972 the appellant issued the originating summons applying to set aside the penalty ordered. This came before Chua J. who dismissed it, expressing the brief opinion that the appellant had been guilty of contempt of court and that the Council was perfectly right in imposing the penalty. The appellant appealed with leave of Chua J. to the Court of Appeal, which dismissed the appeal. In the judgment of that court they said

"We can see no reason to interfere with the order made by the Council. The words uttered by the appellant were in our view improper and ought not to have been used."

A point was sought to be made for the appellant before their Lordships that it had been argued before Chua J. that the words used were "grossly improper" and contempt of court, and that Chua J. held that they constituted contempt of court. Before their Lordships these contentions were not advanced, and seem irrelevant to the question whether the Court of Appeal in the passage quoted was correct. In their Lordships' view the Court of Appeal was correct: and once the appellant failed in his suggestions that the remark was made before the decision was pronounced, and that no matter outside section 84(2) could be the subject of disciplinary action by a penalty, there could be but one outcome of this appeal.

There is one final matter. The Court of Appeal held in the alternative that there was no right of appeal to it in such a case. The respondent did not seek to support that view before this Board, but since it is a question of jurisdiction the question must be dealt with. Their Lordships are of the opinion that there is no sufficient ground for excluding from section 29 of the Supreme Court of Judicature Act (1970 Cap. 15) as "any judgment or order of the High Court in any civil matter" the decision of a High Court judge on an originating summons such as in the present case. There is no provision in the statute (Legal Profession Act) excluding such appeal, and it is not to be found among the non-appealable matters in section 34 of the former Act. The fact that by section 98(6) of the latter Act it is expressly provided in the serious cases where a special court of three judges is to be concerned that there is to be no appeal therefrom to the Court of Appeal but only to the Judicial Committee of the Privy Council suggests to their Lordships that the legislature was not minded to forbid appeal to the Court of Appeal in a case such as the present one.

In the result therefore their Lordships dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Charles Russell & Co.; Jaques & Co.*

SINGAPORE REPORTS

NANYANG GUM BENJAMIN MANUFACTURING (PTE) LTD. v. TAN TONG WOO & ORS.

[C.A. (Wee Chong Jin C.J., Chua and Rajah JJ.) November 16, 1977]

[Singapore — Civil Appeal Nos. 40, 41 & 42 of 1977]

Practice and Procedure — Jurisdiction — Action for possession — Issue of whether premises controlled premises — Whether court had jurisdiction to grant order for possession.

Landlord and Tenant — Action for possession — Jurisdiction — Control of Rent Act (Cap. 266).

In an action for possession where it is in issue that the premises subject matter of the action may or may not be controlled premises, the court has no jurisdiction to grant an order for possession unless the facts are placed before the court. The court must be satisfied that it has jurisdiction under the proper sections or paragraphs contained in the Control of Rent Act (Cap. 266) to grant an order for possession.

Cases referred to:-

(1) *Barton & Anor.* v. *Fincham* [1921] All E.R. Rep. 87.

(2) *Thorne* v. *Smith* [1947] 1 All E.R. 39.

(3) *Peachey Property Corporation Ltd.* v. *Robinson* [1966] 2 All E.R. 981.

CIVIL APPEAL.

K.E. Hilborne for the appellants.

T.G. Dunbar (*Karuppan Chettiar* with him) for the respondents.

Wee Chong Jin C.J. (delivering oral judgment of the Court): The position is this, there are 3 appeals. In Appeal No. 42 an application was made to the High Court to amend the Summons-in-Chambers by substituting a new party, Elite Holding Private Ltd. as a party in place of the three respondents originally named. During the hearing of this appeal and the two other connected appeals, the appellants have applied to add Elite Holding Private Ltd. as the 4th respondent and we have allowed that application. So, so far as Civil Appeal No. 42 of 1977 is concerned we make no order on it.

The other two appeals which we have heard today are Appeals No. 40 and No. 41. Now, it is conceded that the applications in these two appeals ask for identical reliefs — one to restrain by injunction and the other a stay of execution on the writ of possession.

There is a related matter which is before the High Court and which has not been decided and that is an action by the present appellants against all the present four respondents in these two appeals to set aside the judgment obtained by the first three respondents in the District Court as long ago as 1973. The present two appeals are concerned with a writ of possession ordered by the District Court on the judgment which is now the subject matter of the High Court action.

We propose to decide the matters before us in relation to Appeal No. 41 which asks for a stay of execution on the writ of possession granted by the District Court in June this year. The application for stay was refused by the High Court and the present appeal is against that refusal. Two grounds are urged in support of the appeal. The first is that the judgment for possession obtained in 1973 was a nullity on the ground that the District Court had no jurisdiction to make an order for possession because of the provisions of the Control of Rent Act. The contention is based on a line of cases beginning with the case of *Barton & Anor.* v. *Fincham*[1] decided by an English Court of Appeal as long ago as 1931 and followed by the English courts in the case of *Thorne* v. *Smith*,[2] *Peachey* v. *Robinson*[3] etc.

We accept the reasoning of the English court that in an action for possession where it is in issue that the premises the subject matter of the action may or may not be controlled premises, the court has no jurisdiction to grant an order for possession unless the facts are placed before the court. The court must be satisfied that it has jurisdiction under the proper sections or paragraphs contained in our Act to grant an order for possession. On the facts of the action before the District Court in 1973 it is clear that the question whether or not the premises in question were controlled premises was in issue and the consent judgment was obtained without prejudice to the position taken by both parties — plaintiffs as well as the defendants — one alleging that the premises were not controlled, the other alleging that they were. The consent judgment was for possession of the premises to be surrendered years later.

Now, that being the basis on which the writ of possession was issued we are satisfied that the original judgment was a nullity. The application for stay of execution on the writ of possession must accordingly be granted. The High Court action instituted by the present appellants against the present four respondents, we are told in Suit No. 1925 of 1977, has not been finally decided.

As regards the appeal in Appeal No. 40, as the same relief is asked for, we will make no order on this appeal.

We now come to the question of costs. We think enough has been said during the hearing of these proceedings and, having regard to the fact that it was only at this late stage that the 4th respondent was added in as a party to this appeal including the proceedings out of which these appeals arise, that the proper orders would be that each party should bear its own costs here and in the court below.

No order made as to Appeal Nos. 40 & 42. Application for stay of execution granted in Appeal No. 41.

Solicitors: *Hilborne & Co.; Murphy & Dunbar.*